

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

76-7066

To be argued by
EDWIN K. REID

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOSE FERNANDEZ,

Plaintiff,

against

CHIOS SHIPPING CO., LTD.,

*Defendant and Third-Party
Plaintiff-Appellee,*

against

MAHER STEVEDORING COMPANY, INC., and
STATES MARINE LINES, INC.,

*Third-Party
Defendants-Appellants.*

CHIOS SHIPPING CO., LTD.,

Fourth-Party Plaintiff,

against

CASTLE & COOK, INC., MOLE CORP. and
CASTLE & COOK FOODS CORPORATION,

*Fourth-Party
Defendants-Appellants.*

BRIEF ON BEHALF OF DEFENDANT AND THIRD
AND FOURTH-PARTY PLAINTIFF-APPELLEE
CHIOS SHIPPING CO., LTD.

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BRIEF ON BEHALF OF DEFENDANT AND THIRD AND FOURTH-PARTY PLAINTIFF-APPELLEE CHIOS SHIPPING CO., LTD.

The Issues Presented for Review

The issues in this five-party suit are as follows:

1. Where there is sufficient uncontradicted evidence to substantiate the findings of fact of the jury that the third-party defendant-appellant Maher Stevedoring Company, Inc. (Stevedore) breached its warranty of workmanlike

performance, can these findings be considered "clearly erroneous."

2. Where the Time Charterer, third party defendant-appellant States Marine Lines, Inc. (Time Charterer) agreed to load, stow, trim and discharge cargo at their expense under the supervision of the captain, did the lower court err in holding that the Time Charterer warranted the safe and proper performance of loading and discharging cargo and breached the warranty.*

3. Where the fourth party defendant-appellant Castle & Cook, Inc. et al. (Manufacturer-Shipper) admitted engagement in the manufacture and/or sale or distribution of pineapple packaged in cans and cartons and prepalletized for shipment, transportation handling or discharge aboard ocean going vessels and that it expressly undertook to provide a safe, seaworthy and properly palletized package of cartons of pineapple, and the jury found that the pallet supporting prepalletized cargo came apart and was a proximate cause of Plaintiff's accident, should this court direct the lower court to enter judgment in favor of the Shipowner against the Manufacturer-Shipper.

4. Is there sufficient evidence in the record to support a finding that there was a latent defect in the pallet on which cartons of pineapple were stowed; that the defect existed at the time it left the Manufacturer-Shipper's possession and without change came into the possession of the Time Charterer and that this defect was a proximate cause of plaintiff's injury. If so, this court should direct the lower court to enter judgment in favor of the defendant,

* The time charter was marked as Defendants' Ex. D for id. Through oversight it was not marked in evidence. However, the parties and the lower court treated it as if it was in evidence and have so assented to treat it as if in evidence.

third and fourth-party plaintiff-appellee (Shipowner) against the Shipper.

5. Is there sufficient evidence in the record to support a finding that the Manufacturer-Shipper breached its warranty of fitness for use in shipping cargo on defective pallets. If so, this court should direct the lower court to enter judgment in favor of the Shipowner against the Shipper.

6. Where there is sufficient uncontradicted evidence to substantiate the findings of fact of the jury that the Manufacturer-Shipper shipped prepalletized cargo upon a latently defective pallet, that it was negligent and the defective pallet was a proximate cause of Plaintiff's injury, can these findings be considered "clearly erroneous."

7. Did not the trial judge properly exercise her discretion in rulings on relevancy of evidence and did not the trial judge properly admit records procured in the ordinary course of business.

8. Does not the record as a whole warrant the denial of the claim that the trial court committed prejudicial procedural errors.

Statement of the Case

The Time Charterer, Stevedore and Manufacturer-Shipper appeal from the opinion and order of Judge Constance Baker Motley, dated January 15, 1976, and that portion of the final judgment entered, pursuant to that opinion and order, of January 19, 1976 granting indemnity in favor of the Shipowner against the Time Charterer, Stevedore and Manufacturer-Shipper.

The Facts

While the Plaintiff was standing underneath a pre-palletized cargo of cartons of pineapple, which was being lifted from the No. 3 lower hold of the S/S CHIOS, the pallet suddenly broke in the middle (55a-56a, 406a) and spilled cartons of pineapple and one or more struck and injured the Plaintiff. The accident was not reported to the Shipowner (294a). The Stevedore did not retain the broken pallet and it was not available for inspection by the Shipowner (406a).*

The Plaintiff was an employee of the Stevedore who had been hired and paid by the Time Charterer under oral contract to discharge the cargo of the CHIOS. The Shipper was the owner of the cargo (408a). It manufactured the pallets and packaged the cartons thereon in the Philippine Islands (39a). The Manufacturer-Shipper admitted in the pleadings that the Manufacturer-Shipper was and is now engaged in the manufacture and/or sale or distribution of pineapple packaged in cans and cartons and pre-palletized for shipment, transportation, handling and discharge aboard ocean going vessels (401a). The Manufacturer-Shipper also conceded in the pleadings and admitted that at and before the time of loading it undertook to provide the Shipowner with a safe, seaworthy and properly palletized package of cartons of pineapple (401a).

The area where the Plaintiff was working was confined (298a, 299a, 305a-306a, 82a, 86a, 90a, 91a, 92a). He had no

* In answer to interrogatories the Manufacturer-Shipper stated it would make available a palletized package of cartons of pineapple without guarantee that the load would be the same as shipped on the CHIOS (40a). A package was not made available. The Shipowner obtained an order to show cause why a pallet and package should not be made available for inspection. Finally, the Manufacturer-Shipper authorized the Stevedore to comply with the order to show cause. A pallet was made available without assurance that it was the same type and kind used for the S/S CHIOS' shipment with the result that the information obtained from the inspection was useless.

place or sanctuary to which to retreat while the pallets were being discharged and he was required to stand in an area underneath the pallets as they were discharged (298a, 299a, 300a-301a, 302a). It was usual for the vessel's agent to supply the Stevedore with a copy of the vessel's cargo stowage plan showing the location and stow of the palletized cargo (405a).

Plaintiff worked under the supervision and direction of the hatch boss, who in turn worked under the stevedore superintendent whose duty was to supervise the discharge of the cargo (257a). The hatch boss was last seen on the dock before the commencement of the work (43a) and was not around during the cargo operation and at the time of the accident. There is no evidence that the superintendent supervised the discharge. There was no one to coordinate with the signalman (43a) the lifting of the pallets from the hold and to warn the Plaintiff to watch out and stand clear of the drafts as far as possible in the confined working area (299a, 300a, 301a, 302a). The stevedore safety engineer did not go to the No. 3 lower hold until after the accident (80a).

The Time Charter, Clause 8, provided the following:

"That the Captain shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners) shall be under the orders and directions of the charterers as regards employment and agency; and the charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain who is to sign Bills of Lading for cargo as presented in conformity with the Mate's or Tally Clerk's receipts without prejudice to this Charter Party."

The prepalletized cartons of pineapple were one unit or package consisting of a pallet and cartons of pineapple

stowed on top of the pallet. Dole made the pallets and stowed the cartons of pineapple on the pallets (39a-7, 39a-4).

The cartons of pineapple were glued to the pallet and to each other with hand application of the glue (39a-5). No bands or lashings were placed around the pallet and cartons to keep them as an integral unit or as a whole (246a).

Depending on the product, the weight on each pallet varied (39a-4). The average weight of the shipment of 753 pallets of a gross weight of 2,661,534 was 3,534½ pounds per pallet.

The pallets were made of pine wood (254a, 261a) or Lawaan, Philippine hardwood (39a-7) from pre-cut lumber (39a-7), sizes 40" wide x 48" in length. Boards 1" thick (122a) were nailed on 3 notched 2" x 3½" stringers with 2½" CW nails (39a-7 & 8).*

The pallet was made of very light wood, thinner than a stevedore cargo pallet (123a, 249a). A man can lift it (250a). They are a cheap disposable pallet (244a, 246a, 247a, 127a, 386a, 387a) and are disposed of after shipment (244a, 344a). They are used in the food business of which the Manufacturer-Shipper is a part (346a).

In contrast to a pineapple or fruit pallet, there is a stevedore pallet. Stevedore cargo pallets are made of heavy oak with a probable weight of 200 pounds and are generally handled by two men (127a, 247a, 340a). They are 4' x 6'.

* In answering interrogatories, the Manufacturer-Shipper, although asked for the dimensions of the material, failed to state the thickness of the 40" x 48" piece(s) of wood or the weight of the pallet (39a-8-40a) or give any information as to the arrangement of the materials with reference to one another (39a-8). It also failed to produce or give information as to the design of the pallet (39a-7) or a mock-up model ((39a-8) and avoided answering the question whether any load tests were made to determine the strength of the pallet prior to use (396a). It further failed to state the number of cartons per pallet (39a-4).

There are 8 deck boards on either side of 3" x 4" x 3' stringers. Two of the deck boards are 1" thick and 8" wide and 6 of the deck boards are 1 1/8" thick and 6" wide (339a-340a). They can be used many times without normal wear and are made primarily for the benefit of the stevedore (344a).

After the cartons of pineapple were packaged by the Manufacturer-Shipper at Polomok, South Cotabato, Philippines, the packages were delivered on a flat bed truck to the dock at Dadiangos, Cotabato, Philippines (39a-4, 39a-6) and loaded aboard the vessel. They were handled at least 6 times from packaging to the hold of the ship.

Three hundred and seventy pallets were stowed in the No. 3 lower hold of the S/S CHIOS. The packages were eight cartons high or 5' high (49a). They were stowed aboard 3 tier high (63a, 136a, 407a), fairly level (78a).

Upon loading, the Chief Mate of the vessel issued a clean mate's receipt (206a, 378a, Chios Ex. I) and the Time Charterer issued a clean bill of lading in its name (206a, 207a, Chios Ex. J). The Master issued a loading certificate certifying that the cargo was loaded in good order and condition with adequate shoring and properly secured for sea passage. The certificate was countersigned by the Manufacturer-Shipper's supercargo (398a, Chios Ex. N, Item No. 14). The Manufacturer-Shipper had no record of damage to the pallets of packaged cartons from the point of shipment at its plant to loading aboard the CHIOS (39a-6-39a-7).

The Time Charterer in accordance with its custom and practice engaged marine surveyors in the Far East ports where the vessel called to survey the hatches before loading, during loading and to make comments after loading and to take photographs of the stow (195a). The surveyors at Claviera, Manila and Dadiangas (198a, 204a, 210a, Chios Exs. D & D1), Hongkong (206a, Chios Ex. F), Keelung (199a, Chios Ex. E) and Kobe (206a, Chios Ex. G) issued reports which the Time Charterer acted upon

in the course of its operation as Charterer of the vessel. No exceptions were taken as to the cargo compartments, the cargo or stowage. On arrival at New York a survey was conducted, on behalf of the Time Charterer, the day before the accident at Newark (201a, Chios Ex. H). There was no evidence of damage to the prepalletized cartons of pineapple.

After the discharge of the prepalletized cartons of pineapple at Newark, the Manufacturer-Shipper claimed and collected from the Time Charterer for damages to 171 cartons and 236 cartons shortlanded (Chios Ex. H). There is no evidence that the damaged cartons came from the No. 3 lower hold (235a-236a).

Mr. Daniel Devaney, an experienced marine carpenter since 1932, testified for the Shipowner. He was an employee of United Fruit Company from 1932-1935 (338a), the owner of his business from 1942-1966 (337a) and a consultant to John W. McGrath, stevedore, since his retirement in January 1975 (336a-337a, 388a). He expressed an opinion that the probable cause of the breaking of the pallet was the repeated handling of this type of cheap, disposable, fragile pallet and faulty materials in the construction of the pallet (381a, 382a).

In the course of its operations the Time Charterer prepared and issued in its own name the bills of lading (206a, 207a, Chios Ex. J), the cargo manifest (207a-208a, Chios Ex. K), the cargo stowage plan (143a, Pl. Ex. 2), engaged the marine surveyors in the course of its custom and practice to act in its behalf at six loading ports in the Far East and at New York with respect to the condition of the ship's holds, the cargo and stowage. It also hired and paid for the stevedore and received, processed and paid for cargo damage.

There is no evidence that the ship's Master had anything to do with the loading and discharge of the palletized cargo or any other cargo aboard the vessel.

Jury Verdict and Opinion of Lower Court

Based on the evidence the jury found that the Shipowner was liable to the Plaintiff on the ground that the pallet with the cartons of pineapple stowed thereon was unseaworthy and not fit for the purpose intended. The claim of negligence of the Shipowner was not submitted to the jury for failure of proof that the Shipowner had actual or constructive knowledge of any defect in the pallet. Accordingly, liability was imposed upon the Shipowner for the acts or omissions of third parties.

In denying a motion for directed verdicts, notwithstanding the verdict, the court, in an endorsement and order, dated August 7, 1975, stated the following:

"(3) There was evidence from which the jury could find that Maher Stevedoring Co. failed to properly supervise its employees by providing an area for them to retreat to a safe place during the lifting of the pallet. (31a)

"(4) The jury's finding that the pallet was defective could reasonably have been inferred from its breaking without other apparent cause. (31a)

"(5) No finding of negligence on the part of Castle & Cook was necessary; its liability for damages caused by the breaking of the pallet which it constructed was absolute." (32a)

With respect to the Shipowner's claim for indemnity against the Time Charterer, Stevedore and Manufacturer-Shipper, the jury answered the following questions in the affirmative:

"1. Have the parties claiming indemnity against Maher Stevedoring Co., Inc., sustained their burden of proving that the stevedoring company which unloaded the pallets breached its warranty of workman-

like performance by failing to properly supervise and direct its employees with respect to the unloading operation and to provide for the safety of its employees? (33a-34a)

"4. If the answer to any of Questions 1, 2, or 3 is Yes, have these parties sustained their burden of proving that the stevedore's action was a proximate cause of plaintiff's injuries? (34a)

"8. Have the parties claiming indemnity against the Castle Cook-Dole Group sustained their burden of proving that the pre-palletized pineapple unit which broke apart on being lifted was the result of negligence on the part of the Castle Cook-Dole Group? (35a)

"9. Have the parties claiming indemnity against the Castle Cook-Dole Group sustained their burden of proving that the pineapple unit which broke apart was the result of a latent or hidden defect in the pallet? (36a)

"10. If the answer to either Question 8 or 9 is Yes, have the parties sustained their burden of proving that the Castle Cook-Dole Group's actions were a proximate cause of plaintiff's injuries? (36a)"

In its Memorandum Opinion, after the findings of the jury, the lower court considered the claim and cross-claims of the parties. The court held that the Time Charterer was bound to indemnify the Shipowner from its liability to Plaintiff, including costs and attorney's fees, since the Time Charterer impliedly warranted in Clause 8 that it would safely and properly carry out all stevedoring operations (25a). In reaching its conclusion, the court relied upon *Nichimen v. M. V. Farland*, 462 F.2d 319 (2d Cir. 1972) and *Demsey & Associates, Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972) and distinguished cases cited

by the Time Charterer as either being cases by the third party directly against the Time Charterer or as being overruled by *Nichimen*.

Since the jury also found that the Stevedore breached its warranty of workmanlike performance, and since that warranty ran in favor of the Shipowner, *Demsey & Associates, Inc. v. S/S Sea Star, supra*, the lower court found that the Shipowner was entitled to judgment against the Stevedore also (25a). The lower court found there was no merit in the Stevedore's contention that the Shipowner was guilty of conduct sufficient to preclude indemnity. There was no support in the evidence sufficient to meet the test in this Circuit that the Shipowner's fault "must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough." *Albanese v. N.V. Nederl. Amerik Stoomv. Maats.*, 346 F.2d 481, 484 (2d Cir.), *rev'd on other grounds*, 382 U.S. 283 (1965). Moreover, there was no showing at trial that the Shipowner in any way interfered with the stevedoring operations, created any hazardous conditions in connection therewith, or failed to provide a vessel reasonably free from peril. Thus, Maher's counterclaim against Chios on those grounds must fail.

The lower court denied the Time Charterer's counterclaim against the Shipowner in which it asserted that it was the Shipowner who was ultimately responsible for cargo operations and supervision of the stevedores. The lower court found that, in fact, the Time Charter shifted that primary responsibility to the Charterer (26a).

The lower court further held that the Shipowner may recover against the Manufacturer-Shipper upon the jury's findings (25a). The jury found that the defect in the pallet was a latent defect which, by definition, could not have been discovered by the most meticulous inspection (27a). With respect to the Manufacturer-Shipper's counterclaim against the Shipowner on the basis of negli-

gence and also breach of contractual undertaking to provide a seaworthy ship and proper cargo handling operations, the lower court stated (28a):

"These allegations may be briefly disposed of. In the first place, there was no showing of any negligence by Chios and, consequently, no question of its negligence went to the jury. Secondly, the jury's finding of unseaworthiness was due, at least in part, to Castle & Cook's own negligence and use of a defective pallet. Thirdly, there was no proof at trial of any contractual undertaking by Chios to provide stevedoring services."

ARGUMENT

FOIN - 1

The jury correctly found on the uncontradicted evidence that the Stevedore breached its warranty of workmanlike performance.

The Shipowner and the ship are the beneficiaries of the Stevedore's breach of warranty of workmanlike service since the ship and her owner are equally liable to the Plaintiff for the Stevedore-Contractor's breach of the Shipowner's non-delegable duty to provide a seaworthy vessel.

Waterman Steamship Corporation v. Dugan & McNamara, Inc. (1960), 364 U.S. 421;

De Gioia v. United States Lines Company, 304 F. 2d 421 (CA 2d 1962).

The Stevedore's breach of warranty was a breach of the Shipowner's non-delegable duty to provide Plaintiff with a seaworthy vessel and thus the Shipowner was held liable to Plaintiff upon the facts and findings of the jury.

The uncontradicted evidence shows that the Stevedore required Plaintiff to work in a confined place under dra...

of pre-palletized cargo weighing on the average of 3,534½ pounds without a place to retreat while the drafts were being lifted and without proper supervision and direction during the unloading operation and without providing for the safety of the Plaintiff. The stevedore superintendent and hatch boss charged with the supervision of the discharge were not around during the discharge to make the place of work safe or stop work until the place of work was made safe and there was no one with authority to co-ordinate the discharge and warn Plaintiff of the dangers of standing under the drafts.

The jury specifically found in answer to interrogatories that the Shipowner proved that the Stevedore breached its warranty of workmanlike performance by failing to properly supervise and direct its employees with respect to the unloading operation and to provide for the safety of its employees (33a-34a) and that the Stevedore's action was the proximate cause of Plaintiff's injuries (34a).

The lower court agreed that there was evidence to support the jury's findings (31a).

There has been no showing that the findings of the jury are clearly erroneous.

The Stevedore argues that since the Plaintiff was not negligent and the pallet was latently defective, the Stevedore did not breach its warranty. The warranty is not so narrowly construed. The warranty includes proper supervision of work and safety of its employees.

Without further discussion of this point and for the sake of brevity the Shipowner adopts the factual details and law as set forth in the reply brief of the Time Charterer, Point I, insofar as it pertains to the Shipowner.

In the circumstance the Shipowner is entitled to indemnity from the Stevedore for all such sums paid by the Shipowner to Plaintiff, including reasonable costs and counsel fees incurred by the Shipowner in the defense of

the Plaintiff's action against the Shipowner. The lower court also awarded counsel fees and expenses in favor of the Shipowner against the Time Charterer and the Manufacturer-Shipper. Costs and counsel fees are a proper element of damages.

De Gioia v. United States Lines Co., supra;
Paliaga v. Luckenbach Steamship, 301 F.2d 403
(CA 2, 1962).

POINT II

The lower court properly held that Clause 8 of the Time Charter imposed a warranty of safe and proper performance of loading and discharging cargo upon the Time Charterer who breached the warranty.

Clause 8 of the Time Charter between the Shipowner and the Time Charterer contains an express agreement between the parties with respect to loading and discharging. It is set forth verbatim at page 5, *supra*. It provides that the Captain (although appointed by the owners) shall be under the orders and directions of the charterers as regards employment and agency; and the charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain.

The S/S CHIOS was chartered from the Shipowner to the Charterer under time charter. During the course of the Charterer's operation under the time charter it prepared and issued in its own name the bills of lading for the Manufacturer-Shipper's cargo, the cargo manifest, the cargo stowage plan and engaged maritime surveyors in accordance with its custom and practice to act in its behalf at six loading ports in the Far East and at New York with respect to the condition of the ship's hold, the cargo and stowage. It also hired and paid for the Stevedores who stevedored the vessel and it received, processed and paid

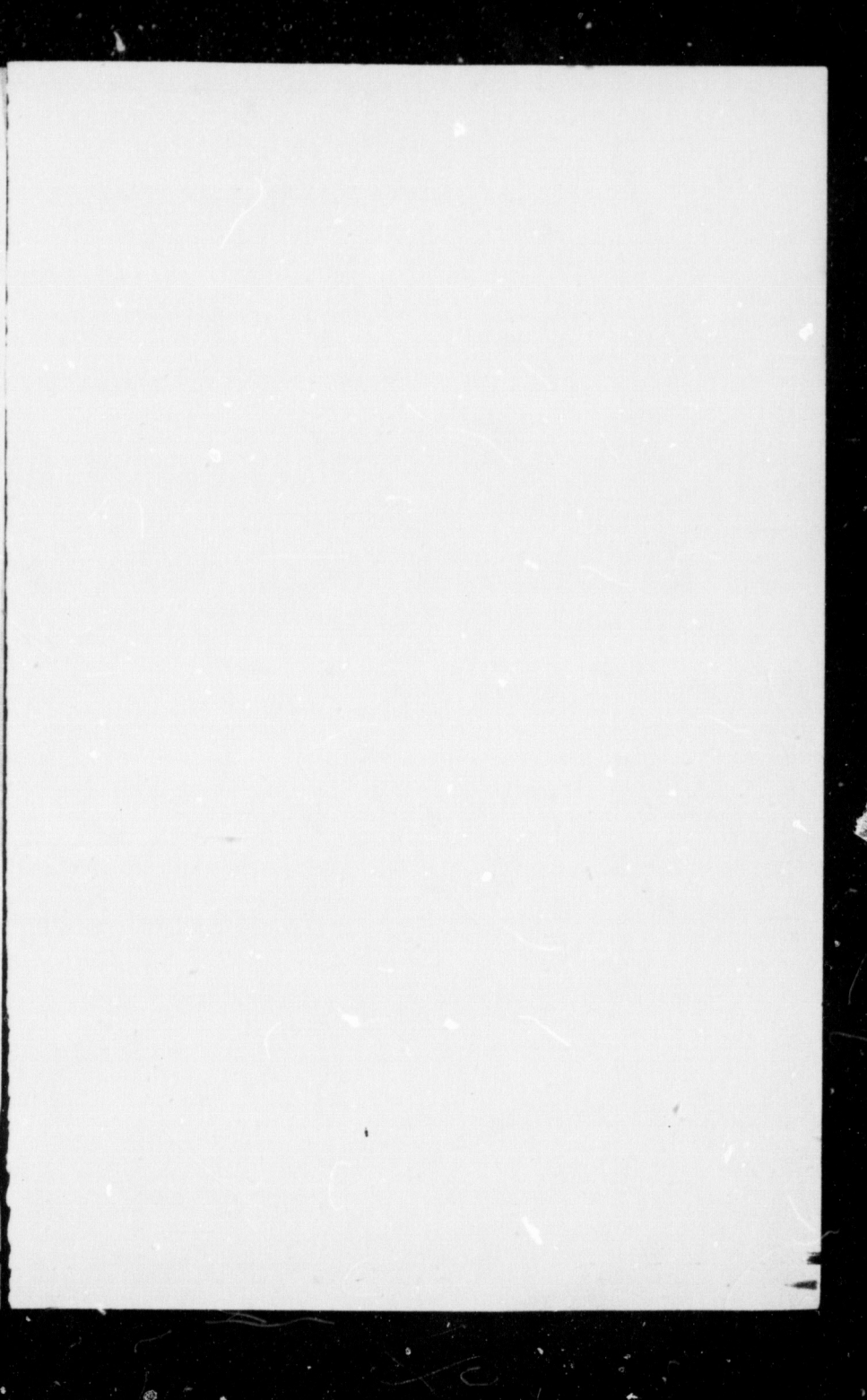
cargo damage claims presented by the Manufacturer-Shipper.

There is no evidence that the ship's Master had anything to do with the loading and discharge of the pre-palletized cargo or any other cargo aboard the vessel.

The Shipowner contended at the trial that the express agreement of the Charterer is a warranty of safe and proper performance of loading and discharge which the Charterer breached and thereby imposed liability upon the Shipowner to the Plaintiff for breach of warranty to provide Plaintiff a seaworthy vessel. The lower court agreed with the Shipowner's position.

The lower court relied upon *Demsey & Associates Inc. v. S/S Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972) and *Nichimen v. M/V Farland*, 462 F.2d 319 (2d Cir. 1973). In both of those cases, Clause 8 of the Time Charter, and the Time Charter, are identical with the Clause 8 in the Time Charter in the case at bar. In the *Sea Star* the court found that Clause 8 of the Time Charter placed the duty to load and stow the coils upon the Time Charterer. The Time Charterer defectively chocked, shored and stowed steel coils which placed liability upon the SEA STAR to cargo interests for the damage resulting from the acts of the Time Charterer. As between the Shipowner and the Time Charterer, the court held that the responsibility for the damage caused by the shifting and rolling of the coils due to defective chocking, shoring and stowage rested upon the Time Charterer. Accordingly, to the extent that the Plaintiff recovered in rem from the SEA STAR, the Shipowner was entitled to indemnity from the Time Charterer.

The *Nichimen* case is a definitive opinion on the recurring question of the division of ultimate liability for cargo lost and damaged between Shipowner and Time Charterer. Cargo interests sued the vessel, her owners, and her time charterers for damage to cargo which broke adrift during heavy weather. The Shipowners denied liability, but



claimed indemnity from the Time Charterers with respect to any liability which might be imposed. It was found that the damage was the result of improper stowage; both Shipowners and Time Charterers were held liable to the cargo interests, but the Shipowners were awarded indemnity from the Time Charterers for the amount of the judgment against them and the expense of defending the cargo claim.

Chief Judge Friendly stated that if the damage had occurred because of some defect in the vessel which the master had failed to correct, then primary liability would have rested with the Shipowners, since such a cause is not within the scope of the loading responsibilities which the New York Produce Exchange time charter form had intended to shift to the charterers. But with respect to cargo damage resulting from improper stowage, the Shipowners are ultimately liable only in instances where the master intervenes to protect the safety of the vessel and her ability to withstand perils of the sea. To the extent that the master acts merely to protect the cargo, the ultimate responsibility rests with the charterers. Following and in accord with *Nichimen* is the unreported Memorandum Opinion and Order in *Marion Carl Migut et al. v. Astrobrillo Compania Naviera S.A., et al.*, U.S.D.C. E. D. Mich., N. Div., dated 2/3/76 which will be handed to the court upon argument of this appeal.

The lower court found that under *Nichimen*, Clause 8 of the Time Charter imposed a warranty of safe and proper performance of loading and discharging cargo from the Time Charterer who in the present case breached the warranty. The breach by the Time Charterer created an unseaworthy condition for which the Shipowner was held liable to the Plaintiff. Just because the *Sea Star* and *Nichimen* are cargo cases, it does not necessarily follow that the *Sea Star* and *Nichimen* are limited to cargo cases. Clause 8 is not so restricted and is broad enough to cover personal injuries arising out of the express undertaking of the

Charterer where the Time Charterer's breach is the proximate cause of the Shipowner's liability to the Plaintiff for unseaworthiness. The lower court so held. Furthermore, the Time Charterer's operations under the charter were far reaching with respect to the cargo, as set forth above, and expressly shows that the Time Charterer had complete supervision, direction and control of the cargo from the inception of loading through discharge and issued pertinent documents in its own name and was the carrier of the Manufacturer-Shipper's cargo.

Negligence may give rise to a breach of warranty, but a breach of warranty is not dependent upon negligence. It is a non-delegable duty from which the Time Charterer may not escape, although it may hire a stevedore to perform the functions which it warranted. The breach of warranty may be brought into play by the negligence or the breach of warranty of the stevedore hired to discharge cargo.

It is submitted that the lower court properly construed *Nichimen* in holding that the Time Charterer warranted to the Shipowner safe and proper performance in loading and discharging cargo. This warranty was breached by reason of the breach by the Stevedore of its warranty of workmanlike performance in failing to properly supervise and direct its employees with respect to the unloading operation, and to provide for the safety of his employees, and that the Stevedore's actions, and thus the Time Charterer's actions, were the proximate cause of the Plaintiff's injuries.

This court should affirm the lower court's findings.

POINT III

The court below found that the Manufacturer-Shipper's liability was absolute, thus this court should direct the lower court to enter judgment in favor of the Shipowner against the Manufacturer-Shipper on this ground.

The Shipowner claimed a right over by way of indemnity from the Manufacturer-Shipper on the ground of breach of contract, breach of warranty, strict liability in tort and negligence.

Cf. Simpson Timber Co. v. Parks, 390 F.2d 353, n. 4 (CA 9th, 1968).

The Manufacturer-Shipper admitted in its pleading that the Manufacturer-Shipper was and is now engaged in the manufacture and/or sale or distribution of pineapple packaged in cans and cartons and pre-palletized for shipment, transportation, handling and discharge aboard ocean going vessels (401a). The Manufacturer-Shipper also conceded in the pleadings and admitted that at and before the time of loading it undertook to provide the Shipowner with a safe, seaworthy and properly palletized package of cartons of pineapple (401a).

The jury found that the Shipowner sustained his burden of proving that the pineapple unit which broke apart was the result of a latent or hidden defect in the pallet (36a) and also sustained its burden of proving that the Manufacturer-Shipper's action was a proximate cause of Plaintiff's injuries (36a).

The lower court stated that the jury's finding of unseaworthiness was due, at least in part, to the Manufacturer-Shipper's use of a defective pallet. The jury's finding that the pallet was defective could reasonably have been inferred from its breaking without other apparent cause

(31a). No finding of negligence on the part of Castle & Cook was necessary; its liability for damage as caused by the breaking of the pallet which it constructed was absolute (32a).

The lower court did not submit to the jury the issue of the Manufacturer-Shipper's absolute duty to which the Manufacturer-Shipper expressly agreed to be the standard of care owed to the Shipowner as evidenced by the admissions in the pleadings.

Based upon the evidence, the findings of the jury that the pallet broke was enough to bring into play the breach of the Manufacturer-Shipper's duty to furnish a safe, seaworthy and properly palletized package of cartons of pineapple. This court should direct the lower court to enter judgment in favor of the Shipowner against the Manufacturer-Shipper on this ground.

POINT IV

Based upon the evidence, the jury and lower court's findings, there is support for a finding that there was a latent defect in the pallet which existed at the time it left the Manufacturer-Shipper's possession, and there was no change in the condition when it came into the Time Charterer's possession, and thus this court should direct the lower court to enter judgment in favor of the Shipowner against the Manufacturer-Shipper.

The second and third claim of the Shipowner against the Manufacturer-Shipper sounded in breach of warranty of fitness for use and strict liability in tort.

The court below did not give to the jury the question as to whether the Shipowner proved against the Manufacturer-Shipper its causes of action for breach of warranty of fitness for use and strict liability in tort.

It is submitted that on the facts, the findings of the jury, the findings of the lower court and the law that the Shipowner proved those two causes of action and thus the court should direct the lower court to enter judgment in favor of the Shipowner against the Manufacturer-Shipper on those grounds.

The cause of action for breach of warranty of fitness for use and strict liability in tort are so similar that they will be treated as one. The distinction between the two is more often one of a nomenclature than of substance.

In re Marine Sulphur Transport Corp., 312 F. Supp. 1081 (SDNY 1971).

The doctrine of implied warranty has gained general acceptance and has been incorporated into the admiralty law.

Lindsay v. McDonnell Douglas Aircraft Corp., 460 F. 2d 631, 666 (CA 8th 1972);

Krause v. Sud Aviation Societe Nationale de Constructrcons Aeronautiques, 301 F. Supp. 513 (SDNY 1968), *aff'd*. 413 F. 2d 428 (CA 2d 1969).

So has strict liability in tort.

In re Alamo Chemical Transportation Co., 320 F. Supp. 631 (S.D. Tex. 1970).

To prevail on strict liability in tort the Shipowner had to prove three elements:

1. At the time the prepalletized package was delivered to the vessel for carriage it was in a defective condition, unreasonable, dangerous to Plaintiff and those working in the hold of the vessel.

2. The prepalletized package was expected to and did reach the vessel without a substantial change in the condi-

tion in which the Manufacturer-Shipper delivered it to the ship.

3. The defective condition in the prepalletized package proximately caused injury to Plaintiff and to the Shipowner.

The jury's finding of a latent defect and the affirmance of that finding by the lower court should not be disturbed.

The jury found that the Shipowner sustained its burden of proving item No. 3, that the pineapple unit which broke apart was the result of a latent or hidden defect in the pallet (36a), and also sustained its burden of proving that the Manufacturer-Shipper's action was a proximate cause of Plaintiff's injuries (36a).

The lower court stated that the jury's finding of unseaworthiness was due, at least in part, to the Manufacturer-Shipper's use of a defective pallet. The jury's finding that the pallet was defective could reasonably have been inferred from its breaking without other apparent cause (31a). No finding of negligence on the part of Castle & Cook was necessary (32a).

The finding that the cause of the breakup of the pallet was a latent or hidden defect which could have been reasonably inferred by the jury from its breaking without other apparent cause, supports proof of items No. 1 and 2 when considered with other uncontradicted facts. The Manufacturer-Shipper submitted no evidence that damage occurred to the pallets from the point of transportation from its plant upon its own flatbed truck (39a-6) to loading aboard the S/S CHIOS by its own stevedore (39a-3-39a-4). When the cargo passed into the possession and control of the Time Charterer it was inspected by the Mate and the supercargo of the Manufacturer-Shipper. The Mate issued a clean mate's receipt. The Master issued a loading certificate certifying that the cargo was loaded in good order and condition with adequate shoring and properly secured for

sea passage. The certificate was counter-signed by the supercargo. The Time Charterer issued a clean bill of lading. The local marine surveyor engaged by the Time Charterer was in attendance at the loading and stowage and passed the cargo and its stowage without exception. The pallet broke on second handling on discharge. It was removed from the stow with a fork-lift to the square of the hatch where it was lifted by ship's gear and broke when it was 8'-10' above the floor of the square of the hatch.

The Manufacturer-Shipper argues, contrary to the findings of the jury and the lower court, that there was a failure of proof of a defect, much less a latent defect, and that the defect was a cause of the breaking of the pallet. It attacks the testimony of Mr. Devaney, a marine carpenter of 43 years experience, on the issue of a causation.

The lower court's holding that the jury's finding that the pallet was defective, and could reasonably have been inferred from its breaking without other apparent cause (31a), is a correct statement of the law.

A product is in a defective condition when it is unreasonably dangerous to the user to whom it has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics.

Cf. Federal Jury Practice & Instruction Sec. 75.02A, pg. 140 (Pocket Part 1974).

It is not necessary to point out a specific defect so long as it is demonstrable that some fault in the article, an unexplained occurrence, was responsible.

Houston-New Orleans, Inc. v. Page Engineering Co., 353 F.Supp. 890 (E.D. La. 1972);

Franks v. National Dairy Products Corp., 414 F.2d 682, 685 (CA 5th, 1969);

Hunter v. Ford Motor Company, 37 AD 2d 335.

Proof of a defect and the existence of a defect at the time the palletized cargo left the Manufacturer-Shipper's possession can be, and was shown, by circumstantial evidence.

Lindsay v. McDonnell Douglas Aircraft Corp., *supra*;

Rosenzweig v. Arista Truck Renting Corp., 34 AD 2d 542;

Markel v. Spenser, 5 AD 2d 400, *aff'd* 5 NY 2d 958;

Guagliardo v. Ford Motor Co., 7 AD 2d 472.

The Manufacturer-Shipper claims that a shipment of 753 pallets of cargo which did not break speaks of the soundness of the pallets. The argument is without substance. The mere fact of continuous safe use of a product is not, by itself, conclusive evidence that the product was not defective and does not invalidate an assertion of a defect in one pallet.

Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 714 (CA 10th 1974) *cert. den.* 419 U.S. 1107.

The Manufacturer-Shipper's attack on Mr. Devaney and the issue of causation is misplaced. As between the Shipowner and the Manufacturer-Shipper, the latter was best able to adopt preventative measures to assure that the pallet and its cargo was safe for the intended use.

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964).

It failed to divulge what preventative measures it took. It avoided production of documents and full responsive answers to interrogatories with respect to the design, testing, inspection of the pallets. It thwarted the attempt of the Shipowner to inspect a comparable pallet and cargo. It called no witness on its behalf at the trial in the hope that its avoidance of full disclosure would result in the failure of the Shipowner to prove a *prima facie* case.

The trial court did permit Mr. Devaney to express an opinion. He was of the opinion that the probable cause of the breaking of the pallet was the repeated handling of this type of cheap, disposable, fragile pallet and faulty materials in the construction of the pallet (381a, 382a).

If it is assumed *arguendo* that Mr. Devaney's opinion is without basis, the jury had a right to use their own common sense and experience and to draw all reasonable inferences from the physical facts and occurrences and conclude that there was some defective condition in the product itself.

Franks v. National Dairy Products Corp., supra.

POINT V

There is sufficient uncontradicted evidence that the Manufacturer-Shipper was negligent and the negligence was a proximate cause of Plaintiff's injury.

The Shipowner claimed that it was entitled to an indemnity from the Manufacturer-Shipper on the ground that the latter's negligence gave rise to an unseaworthy condition which cast the Shipowner in damages to the Plaintiff.

The jury answered the following questions in the affirmative:

"8. Have the parties claiming indemnity against the Castle Cook-Dole Group sustained their burden of

proving that the pre-palletized pineapple unit which broke apart on being lifted was the result of negligence on the part of the Castle Cook-Dole Group? (35a)

"9. Have the parties claiming indemnity against the Castle Cook-Dole Group sustained their burden of proving that the pineapple unit which broke apart was the result of a latent or hidden defect in the pallet? (36a)

"10. If the answer to either Question 8 or 9 is Yes, have the parties sustained their burden of proving that the Castle Cook-Dole Group's actions were a proximate cause of plaintiff's injuries?" (36a)

The lower court held that the Shipowner may recover against the Manufacturer-Shipper upon the jury findings (25a). The jury found that the defect in the pallet was a latent defect which, by definition, could not have been discovered by the most meticulous inspection (27a). The jury's finding that the pallet was defective could reasonably have been inferred from its breaking without other apparent cause (31a). The jury's finding of unseaworthiness which placed liability upon the Shipowner was due, at least in part, to the Manufacturer-Shipper's own negligence and use of a defective pallet (28a).

The issues of the defect in the pallet, its existence at the time it left the Manufacturer-Shipper's possession and remained in the defective condition without change when it came into the possession of the Time Charterer, together with the Manufacturer-Shipper's arguments have been discussed under Point IV.

The Manufacturer-Shipper failed to furnish a design (39a-7) or mock-up model of the pallet (39a-8). It did not respond to the interrogatory as to whether any load tests were made to determine the strength of a pallet prior to use (396a). It produced no witnesses or documents at the trial.

The Manufacturer-Shipper as manufacturer had the affirmative duty to make such tests and inspections during and after the process of manufacture, which are commensurate with the dangers involved in the intended use of the product.

Nicklaus v. Hughes Tool Co., 417 F.2d 983, 986 (CA 8th, 1969).

The failure of the Manufacturer-Shipper to respond as to whether any load tests were made to determine the strength of the pallet must be taken that it made no tests and did not discharge its affirmative duty.

Failure to produce a design or mock-up model or a pallet comparable with the one which broke must be taken as an avoidance of a proper inquiry as to whether the design was defective. It is submitted that the failure of full disclosure permits an inference that had the documents and facts sought been produced, they would have been unfavorable to the Manufacturer-Shipper. As between the latter and the Shipowner, the latter was in the best position to explain.

Italia Societa di Navigazione v. Oregon Stevedore Co., *supra*.

It failed to do so when asked to respond.

The court correctly instructed the jury on the manufacturer's duty, the breach of which gives rise to negligence (493a-497a). The briefs of the adverse parties do not except to the court's charge.

In the circumstances the jury's finding of negligence on the part of the Manufacturer-Shipper and the further finding that the negligence was a proximate cause of Plaintiff's injury should be affirmed.

POINT VI

The trial judge properly exercised her discretion in ruling on relevancy of evidence and properly admitted in evidence records procured in the ordinary course of business.

The Manufacturer-Shipper objected to the admission in evidence of the marine surveyor's reports of surveys at six loading ports in the Far East and at New York. The reports dealt with the condition of the ship's holds to receive cargo, the cargo and the stowage of the cargo. It is submitted that they were properly admitted in evidence as relevant to the issues involved in the case.

The surveyors were engaged by the Time Charterer in accordance with its custom and practice as a Time Charterer. It received the reports and acted upon them. It kept reports in the usual course of business.

POINT VII

The record as a whole warranted the denial of the claim that the trial court committed prejudicial errors.

The Shipowner adopts as its own the brief of the Time Charterer on this point.

POINT VIII

The jury's verdict was not excessive.

The Manufacturer-Shipper attacks the jury's award as being excessive.

The jury awarded Plaintiff damages in the sum of \$90,200 against the Shipowner. The Shipowner has settled with the Plaintiff for \$75,000.

The trial judge believed the verdict was reasonable and denied motions that it be reduced because it was excessive.

The trial judge stated:

"(1) The jury could infer permanency as a medical finding of fact from the evidence presented at trial. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

"(2) The jury having found permanency of injury, its award of \$23,700 for past pain and suffering over a period of seven years, and \$32,300 for future pain and suffering for over sixteen years does not appear so excessive as to constitute a denial of justice."

The Manufacturer-Shipper has made no showing that the verdict was so excessive as to constitute a denial of justice.

Conclusion

The judgment below granting the Shipowner indemnity against the Time Charterer, the Stevedore and the Manufacturer-Shipper, together with counsel fees and expenses, should be affirmed in all respects and that the court should direct the trial court to enter judgment in favor of the Shipowner against the Manufacturer-Shipper on the ground of breach of warranty of unseaworthiness of its goods and strict liability in tort.

Respectfully submitted,

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Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 14TH day of MAY, 1976

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